NIAGA TANI SDN BHD

v.

SAMAREZ HOLDINGS BHD

HIGH COURT MALAYA, IPOH
SU GEOK YIAM JC
[CIVIL SUIT NO: 22-88-2000]
4 MARCH 2002

CIVIL PROCEDURE: *Stay of proceedings - Arbitration agreement - Exercise of discretion to grant or refuse stay pending arbitration - Principles applicable - Whether there was a bona fide dispute or difference of opinion - Entry of unconditional appearance - Filing of affidavit-in-reply - Whether amounted to taking a step in proceedings - Whether such irregularity could be waived - Whether there was readiness or willingness to proceed to arbitration - Arbitration Act 1952, s. 6*

ARBITRATION: *Stay of proceedings - Principles applicable - Agreement - Whether there was a bona fide dispute or difference of opinion - Entry of unconditional appearance - Filing of affidavit-in-reply - Whether amounted to taking a step in proceedings - Whether such irregularity could be waived - Whether there was readiness or willingness to proceed to arbitration - Arbitration Act 1952, s. 6*

This was an appeal by the plaintiff against the decision of the learned senior assistant registrar ('SAR') dismissing the defendant's application to stay all proceedings ('encl. 7'), pending the reference to arbitration of certain disputes arising from an agreement between the plaintiff and defendant involving goods sold and delivered ('the contract').

The issues that required determination in this appeal were: (1) whether there was a dispute or difference of opinion which must be referred to arbitration; (2) whether the entry of an unconditional appearance by the defendant constituted a step in the proceedings; (3) whether the plaintiff was precluded from invoking it because of its failure to give prior notice of the preliminary objection before the learned SAR heard encl. 7; (4) whether the plaintiff, by filing its affidavit-in-reply ('encl. 11'), had waived the irregularity; (5) whether the filing of an affidavit-in-reply to resist a summary judgment application at the same time as the filing of encl. 7 constituted a step in the proceedings; (6) whether the plaintiff was precluded from invoking it because of the prior express agreement between both parties' solicitors that the plaintiff's solicitors would not raise the issue at the hearing of encl. 7; and (7) whether the defendant showed any readiness or willingness to go to arbitration.

Held:

[1] There was no dispute or difference of opinion between the plaintiff and defendant in connection with the contract because there was an express admission of liability by the defendant of an outstanding debt. Furthermore, the defendant's failure to contradict the positive assertion by the plaintiff on a material issue *ie*, the liability of the defendant for the goods supplied by the plaintiff, was also construed as an admission by the defendant; regarding the plaintiff's claim for interest to the defendant's overdue accounts, the defendant's conduct, on the facts, also showed an implied admission of liability. (pp 341 i, 342 a-b & 343 a-f)

[2] Under s. 6 of the Arbitration Act 1952, the entry of an unconditional appearance did constitute taking a step in the proceedings. Hence, the defendant's submission that entry of such an appearance did not preclude the court's right to entertain encl. 7, was misplaced. (pp 348 c & 349 g-h)

[3] Issue (3) must be answered in the negative as although the appeal to the judge in chambers was called an appeal, it was in actual fact a rehearing of the defendant's application; it would have to be dealt with afresh and the court's discretion exercised independently as if the application were being heard for the very first time, without being constrained or fettered by the decision of the learned SAR. (p 350 d)

[4] Enclosure 11 was filed to resist and oppose the defendant's application for stay, not to oppose the defendant's entry of unconditional appearance. Therefore, it could not be said that there was a waiver by the plaintiff of its right to rely on the filing of an unconditional appearance by the defendants as constituting a step in the proceedings. (p 351 d)

[5] Issue (5) must be answered in the negative as the affidavit-in-reply ('encl. 8') was filed by the defendant simultaneously with encl. 7. (p 351 f)

[6] The plaintiff, having agreed that the filing of encl. 8 by the defendant would not prejudice the defendant's application for stay, could not therefore be allowed to rely on the filing of encl. 8 by the defendant as a step in the proceedings. (p 353 d-e)

[7] Issue (7) should be answered in the negative as there was a clear failure by the defendant to show in its affidavit in support of encl. 7 that it was at all times ready and willing to do all things necessary to the proper conduct of arbitration. (p 356 b-c)

[Appeal dismissed.]

Case(s) referred to:

Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd [1998] 4 MLJ 497 ***(refd)***

Ashville Investments Ltd v. Elmer Contractors Ltd [1989] QB 488 ***(refd)***

Bede Steamship Shipping Co Ltd v. Bunge Y Born Limitada SA [1927] 27 Lloyd's Rep 410 ***(refd)***

Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 ***(refd)***

First Steamship Co Ltd v. CTS Commodity Transport Shipping SchiffahrtsgesellschaftmbH, The Ever Splendour [1988] 1 Lloyd's Rep 245 ***(refd)***

Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor [1979] AIR SC 1203 ***(refd)***

Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal [1999] 2 CLJ 843 ***(foll)***

Jasabena Sdn Bhd v. Beh Heng Poo & Anor [1985] 1 MLJ 394 ***(refd)***

JF Robertson & Co v. A T James & Co [1923] 16 L1 L Rep 34 ***(refd)***

London & North Western & Great Western Joint Railway Companies v. JH Billington Ltd [1899] AC 79 ***(refd)***

London and North Western Railway v Jones [1915] 2 KB 35 ***(refd)***

Massabudi Corp Sdn Bhd v. Bactra Properties Sdn Bhd [1997] 5 CLJ 382 ***(refd)***

Metropolitan Tunnel and Public Works Ltd v. London Electric Rly Co [1926] Ch 371 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Nova (Jensey) Knit Ltd v. Kammgarn Spinnerei GmbH [1977] 1 WLR 713 ***(refd)***

Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63 ***(refd)***

Pembinaan Leow Tuck Chin & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 ***(refd)***

Pitchers Ltd v. Plaza (Queensbury) Ltd [1940] CA 151 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat [1996] 1 CLJ 231 ***(dist)***

The "Dong Moon" Trans Asia Shipping Co Ltd v. "Dong Moon" Owners & Ors [1979] 1 MLJ 152 ***(not foll)***

Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2) [1999] 3 CLJ 215 ***(not foll)***

Trans Resources Corporation Sdn Bhd v. Sanwell Corporation & Anor [2001] 1 CLJ 449 ***(refd)***

Turner & Goudy v. McConnel & Anor [1985] 1 WLR 898 ***(dist)***

Uni-Navigation Pte Ltd v. Wei Loong Shipping Pte Ltd [1993] 1 SLR 876 ***(refd)***

Union of India v. EB Aaby's Rederi A/S [1975] AC 797 ***(refd)***

Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 ***(foll)***

Yoong Jih Ping & Anor v. Gunapati Suppiah & Ors [1995] 3 CLJ 299 ***(dist)***

Legislation referred to:
Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 14A, O. 18 r. 19
Societies Act 1966, s. 16

Arbitration Act 1889 [UK], s. 4
Arbitration Act 1950 [UK], s. 4
Rules of the Supreme Court [UK], O. 14

Other source(s) referred to:
Halsbury's Laws of England, vol 2, 4th edn, Reissue, p 347, paras 613, 627

For the plaintiff - Lee Noushi; M/s Gideon Tan Razali Zaini
For the defendant - Chun Chee Chong (Sharifah Intan Syed Adam); M/s CC Chun & Co

Reported by Suresh Nathan

JUDGMENT

Su Geok Yiam JC:
This is an appeal to the judge in chambers (encl. 22) against the decision of the learned senior assistant registrar dated 14 May 2001 dismissing the defendants' application (encl. 7) to stay all proceedings pending the reference to arbitration of what the defendants claim are disputes arising from an agreement in a case involving goods sold and delivered.

Facts And Background
Before I deal with the issues which have arisen for my determination in this appeal it is necessary that I narrate the relevant facts which are simple and uncomplicated and also the background first.

The Plantiffs' Writ Of Summons And Statement Of Claim
The plaintiffs' claim is for goods sold and delivered.

On 3 April 2000, the plaintiffs took out a writ of summons (encl. 1) against the defendants claiming a sum of RM369,040.39 representing the amount which the defendants are indebted to the plaintiffs for fertilisers sold and delivered to the defendants. The plaintiffs are also claiming interest thereon at 8% per annum from the date of their notice of demand, ie, 21 February 2000, until full settlement.

In their statement of claim the plaintiffs have alleged, *inter alia*, that they had accepted a written offer from the defendants dated 26 January 1999 to supply to the defendants in the year 1999, RM742,992.51 worth of fertilisers. Both

parties then executed a written agreement dated 28 January 1999 ("the contract") to that effect. The contract period was from 28 January 1999 to 30 December 1999.

According to the plaintiffs, as at 31 January 2000 there was a sum of RM369,040.39 which was still owing and payable to the plaintiffs for fertilisers delivered to the defendants by the plaintiffs in accordance with the terms and specifications contained in the contract. The plaintiffs have set out the details and particulars of this sum in para. 6 of their statement of claim.

The Plantiffs' Amended Writ Of Summons

About five months later, on 30 August 2000, the plaintiffs filed their amended writ of summons (encl. 4). As there are only three minor amendments which do not concern the subject matter of this appeal the court shall not deal with them here.

The Defendants' Unconditional Appearance

On 6 October 2000, the defendants, through their solicitors, M/s Gideon Tan Razali Zaini, entered their unconditional appearance *vide* their memorandum of appearance (encl. 5). This fact is significant in view of cl. 22 of the contract which provides that any dispute or difference of opinion between the two contracting parties shall be referred to arbitration in accordance with the Arbitration Ordinance 1950 or any other relevant law in force at that time.

The Plaintiffs' Application For Summary Judgment

In my view, the plaintiffs' claim being the run of the mill claim for goods sold and delivered, in a normal situation it should have come as no surprise to the defendants when five days later, on 11 October 2000, the plaintiffs applied *vide* summons in chambers (encl. 6) for summary judgment to be entered against the defendants pursuant to O. 14A of the Rules of the High Court 1980 (the RHC) for a sum of RM369,040.39, interest thereon at 8% per annum from 21 February 2000 until the date of full settlement, costs and any further relief deemed suitable by the court.

The plaintiffs anchored their application on the defendants' breach of the contract in failing to comply with their demand to pay to the plaintiffs, a sum of RM369,040.39 being the contract price for fertilisers sold and delivered to the defendants.

The plaintiffs have averred that the defendants have no defence on merits to their application. In support of their application, the plaintiffs, through their director, Voon Chee Keong, affirmed an affidavit (encl. 6A) setting out the facts and background leading to their claim for summary judgment.

The plaintiffs have exhibited, *inter alia*, the contract and invoices and debit notes for the fertilisers which they say have been supplied to the defendants, as "VCK1" and "VCK2", respectively. The plaintiffs have also exhibited a letter from the defendants dated 1 December 1999 admitting liability for a sum of RM360,423.86 and a letter of demand dated 21 February 2000 issued by their solicitors ("notice of demand") as "VCK3" and "VCK4", respectively.

The Defendants' Application To Stay All Proceedings Or Alternatively To Strike Out The Plaintiffs' Writ Of Summons And Statement Of Claim

However, exactly a month after the plaintiffs filed their application for summary judgment, the defendants responded by filing on 11 November 2000 a summons in chambers (encl. 7) to have all the proceedings stayed and for the dispute which is the basis of the plaintiff's claim in this action to be referred to arbitration pursuant to cl. 22 of the contract and s. 6 of the Arbitration Act 1952 or alternatively for the plaintiffs' writ of summons and statement of claim to be struck out pursuant to O. 18 r. 19 of the RHC. The defendants also prayed for costs and any further relief deemed suitable by the court.

It is also significant that together with their application, the defendants filed two affidavits both of which were affirmed by their financial manager, Encik Ab Raof bin Abd Jamil on 9 November 2000. The first affidavit was entitled "afidavit jawapan pertama defendan" (encl. 8) and the second affidavit was entitled "afidavit sokongan defendan" (encl. 9).

The Defendants' First Affidavit

In the defendants' affidavit-in-reply (encl. 8) to the plaintiffs' supporting affidavit in respect of the plaintiffs' application for summary judgment, which was affirmed by Encik Ab Raof bin Abd Jamil, the defendants' financial manager, on 9 November 2000 and filed on 11 November 2000, the latter stated, *inter alia*, as follows:

In the month of December 1999, there were negotiations between the plaintiffs and defendants. In the negotiations the defendants had proposed to the plaintiffs that the defendants settle their debt of RM360,423.86 to the plaintiffs on a friendly basis by way of monthly installments of RM20,000 each until the full amount of the debt is completely paid.

The plaintiffs agreed to the defendants' proposal. The plaintiffs also gave their undertaking that the plaintiffs would not proceed with any legal action against the defendants upon the plaintiffs receiving the first payment.

As a result thereof, one Encik Khaw Beng Siong had requested Encik Ab Raof bin Abd Jamil to write a letter to the plaintiffs confirming the terms of

settlement. This was duly done by the latter and the letter dated 1 December 1999 is exhibited in the plaintiffs' supporting affidavit (encl. 6A) as "VCK3".

Subsequent to the letter, the defendants had on 28 December 1999 made the 1st payment to the plaintiff of a sum of RM20,000. A voucher dated 28 December 1999 showing the payment is exhibited as "AR1".

However, in the month of January 2000, the said Encik Khaw Beng Siong had informed Encik Ab Raof that the plaintiffs did not want to be bound by the terms of the settlement and he informed Encik Ab Raof that the defendants had to make full payment of the debt promptly to the plaintiffs.

The defendants became very angry because as businessmen, trustworthiness was of utmost importance and the plaintiffs must abide by what the plaintiffs had promised.

Subsequently, the defendants received the notice of demand. Upon receiving the notice of demand from the plaintiffs it dawned upon the defendants that the plaintiffs had only agreed to the terms of settlement because the plaintiffs had wanted an admission from the defendants concerning the amount of the debt. According to Encik Ab Raof, the plaintiffs acted *mala fide* when they entered into negotiations with the defendants to settle the defendants' debt because the plaintiffs' sole intention was to deceive the defendants in order to induce the defendants to make an admission.

As a result of the alleged deception the plaintiffs are estopped by their own conduct upon receiving the first payment from proceeding with the legal action against the plaintiffs. Further, as the plaintiffs had received consideration, ie, the sum of RM20,000 being the first payment, the conduct of the plaintiffs in instituting the action against the defendants is an abuse of the process of court.

The defendants have also alleged that in actual fact the plaintiffs wanted to abide by the terms of the settlement but it was M/s Farm Cochem Sdn Bhd, the supplier or manufacturer of the fertilisers, who had forced the plaintiffs to institute the proceedings. The defendants have come to this conclusion based on the fact that the notice of demand was carbon copied to M/s Farm Cochem Sdn Bhd.

It would appear from the contents of this affidavit that the defendants had reacted with anger because the plaintiffs had gone back on their word to allow the defendants to settle the sum of RM360,423.86 in monthly instalments of RM20,000 each. It is also apparent that apart from estoppel and abuse of the process of the court the defendants are also seeking to rely on what they allege are the plaintiffs' failure to state the principal amount for the fertilisers

supplied, the absence of the manner in which the interest claimed by the plaintiffs was calculated and the non-entitlement of the plaintiffs to charge any interest for late payment under the contract, as triable issues or defences.

When both the applications, ie, encls. 6 and 7, came up for hearing before the learned SAR on 14 May 2001, the learned SAR ordered encl. 7 to be heard first. Since there is no appeal against this aspect of the learned SAR's decision, I shall deal solely with the merits of encl. 7. It follows, therefore, that I have to refrain from commenting on the merits of the plaintiffs' summary judgment application in this appeal.

The Defendants' Second Affidavit

In the defendant's affidavit (encl. 9) in support of their application to stay all proceedings the defendants have confirmed the existence of the contract by which they were appointed by the plaintiffs to supply fertilisers to the defendants for the defendants' Urus Ladang projects. Despite having entered their unconditional appearance to the plaintiffs' writ of summons and statement of claim, the defendants have sought to rely on cl. 22 of the contract. According to the defendants, cl. 22 requires all disputes and differences of opinion arising from the contract (although the actual words used in cl. 22 are "connected with the contract") to be referred to arbitration in accordance with the provisions of the Arbitration Act 1952. In their second affidavit, the defendants relied on the same three matters which they have raised in their first affidavit, ie, the failure of the plaintiffs to state the principal amount of the fertilisers which the plaintiffs alleged were supplied to the defendants, the absence of the manner in which the interest claimed by the plaintiffs was calculated and the absence of any provision in the contract allowing the plaintiffs to claim interest against the defendants as disputes arising from the contract (although the actual words used in cl. 22 are "connected with the contract").

In conclusion the defendants contend that the writ action being a matter arising from the contract (although the actual words used in cl. 22 are "connected with the contract") should be referred to arbitration as has been mutually agreed upon by both parties in the contract.

The Plaintiffs' Affidavit-In-Reply In Opposition To The Defendants' Application For Stay

In response, the plaintiffs, on 22 November 2000, filed their affidavit-in-reply (encl. 11) which was affirmed on 21 November 2000.

In this affidavit, Voon Chee Keong, the plaintiffs' director, categorically disagreed that there was a dispute arising from the contract (although the actual

words use in cl. 22 are "connected with the contract") on the grounds that the plaintiffs' claim is clearly for fertilisers sold and delivered to the defendants and the defendants have not disputed the amount due and owing to the plaintiffs. As all monthly statements, invoices and debit notes were served on the defendants, it could not be said that the defendants did not know the actual amount due and owing to the plaintiffs nor as to how the interest due and owing was calculated.

Further, there is no dispute concerning any clause in the contract which necessitates a reference to arbitration. In fact the defendants have themselves in their letter dated 1 December 1999 and exhibited as "VCK1" admitted that they owe the plaintiffs a principal sum of RM360,423.86. The amount of and the manner in which the interest is to be calculated is clearly set out in the invoices and debit notes and the defendants have never objected to nor questioned the plaintiffs regarding the same and that, consequently, the defendants are now estopped from denying the same. There was, therefore, no necessity for the matter to be referred to arbitration pursuant to the contract.

I note that the following words appear at the bottom left of each of the 31 invoices which have been exhibited together with three debit notes and a two-paged statement, collectively, as "VCK2":

> Discrepancy and dispute should be reported within 14 days after receipt of this bill. **Interest of 1.5% per month will be levied on overdue accounts**. All cheques to be crossed and drawn to order NIAGA TANI SDN. BHD.. Outstation customers please add bank charge." (Emphasis added).

I also note that the three debit notes were issued to the defendants after their letter dated 1 December 1999 to the plaintiffs admitting liability for a sum of RM360,423.86. The three debit notes bearing nos. 1036, 1038 and 1041 are dated 10 December 1999, 31 December 99 and 31 January 2000, respectively, and are for the amounts of interest RM21,055.22, RM3,887.95 and RM3,673.30, respectively, due on outstanding accounts, RM360,423.86, RM361,479.08 and RM360,423.86, respectively. The two-paged statement dated 29 February 2000 would appear to have been faxed to the defendants on 17 February 2000. It would also appear from the second page of the statement that the first item of interest stated in the debit note no. 1036 dated 10 December 1999 should read RM1,055.22 instead of RM21,055.22.

From the second page of the statement it would appear that the sum RM369,040.39 which is claimed by the plaintiffs in their writ of summons filed on 3 April 2000 comprises a principal sum of RM360,423.86 and interest of RM8,616.53. The latter figure has been arrived at by adding the three interest amounts of RM1,055.22, RM3,887.95 and RM3,673.36.

It is very pertinent that the defendants did not file any affidavit-in-reply to this affidavit. I will deal with this point later on in my grounds of judgment.

Decision Of The Senior Assistant Registrar (SAR)

All in all, the plaintiffs filed a total of four affidavits in respect of their application for summary judgment including their supporting affidavit, *viz* encls. 6A, 10, 13 and 15 which were filed on 11 October 2000, 22 November 2000, 15 December 2000 and 5 January 2001, respectively.

The defendants, on the other hand, filed a total of three affidavits-in-reply, *viz* encls. 8, 12 and 14 which were filed on 11 November 2000, 6 December 2000 and 26 December 2000, respectively.

I shall not touch on the contents of encls. 10, 12, 13, 14 and 15 as I am of the view that these are not relevant to this appeal since there is no appeal against the order of the learned SAR dated 14 May 2001 ordering encl. 7 to be heard first and adjourning encl. 6 to a later date, ie, 30 July 2001, for hearing.

At the conclusion of the hearing, the learned SAR dismissed with costs the defendants' application for a stay of all proceedings and for the matter to be referred to arbitration (encl. 7). The learned SAR also ordered prayer (2) of encl. 7 for the striking out of the plaintiffs' writ action and statement of claim to be struck out upon its withdrawal by the defendants.

The Defendants' Appeal To The Judge In Chambers

Dissatisfied with the dismissal of their application for stay of all proceedings (encl. 7) by the learned SAR, the defendants filed their notice of appeal to the judge in chambers (encl. 22) on 16 May 2001.

The Appellants' Case

On 6 September 2001, when the appeal came up for hearing before me, Miss Lee Noushi, the learned counsel for the appellants/defendants, submitted as follows:

First, based on the Federal Court case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231 there is a *bona fide* dispute since the contract did not provide for the payment of interest by the appellants/defendants and that, therefore, the dispute should be referred to arbitration.

Secondly, the plaintiffs cannot raise the filing of the unconditional appearance by the defendants to defeat the defendants' application for stay because the

plaintiffs did not give prior notice to the defendants that they intended to raise the preliminary objection before the learned SAR.

Thirdly, the filing of an unconditional appearance does not amount to the taking of a fresh step in the proceedings. She cited the decision of the High Court in the case of *Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No. 2)* [1999] 3 CLJ 215 and urged the court to follow the decision even though it has since been overruled by the Court of Appeal. She also relied on the case of *The Dong Moon* [1979] 1 MLJ 152 where the High Court granted a stay of proceedings although an unconditional appearance was filed.

Fourthly, even if the filing of an unconditional appearance does amount to the taking of a fresh step in the proceeding, the plaintiffs, by filing an affidavit in opposition to the defendant's application for stay, must be taken to have waived the irregularity brought about by the filing of the unconditional appearance by the defendants. She placed reliance on the case of *Yoong Jih Ping & Anor v. Gunapati s/o Suppiah & 13 Ors* [1995] 3 CLJ 299.

Fifthly, the filing of an affidavit to oppose the plaintiffs' application for summary judgment does not amount to the taking of a fresh step in the proceedings because in the case of *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 the Supreme Court held that the filing of an affidavit to resist an application for an interlocutory injunction did not amount to the taking of a fresh step in the proceedings. However, if I am inclined to so hold then the respondents/plaintiffs are barred from raising this issue on the ground that lawyers should be bound by what they have agreed. Miss Lee Noushi was most insistent that prior to the filing of encl. 8 the lawyers for both the parties had expressly agreed that the plaintiffs would not rely on the filing of encl. 8 as constituting a fresh step in the proceedings. In fact Miss Lee Noushi herself had telephoned Mr CC Chun to enquire from him whether he would treat the filing of an affidavit-in-reply by the defendants to resist the plaintiffs' application for summary judgment as a fresh step in the proceedings and the latter said he would not. The latter also said that he would only proceed on the issue of the defendants filing an unconditional appearance. She tendered two letters to the court which were written by way of confirmation of what had actually transpired during the telephone conversation. Since Mr CC Chun had remained silent upon receipt of both the letters and the fact that encls. 7 and 8 were filed subsequent to the two letters and on the same day, ie, on 11 November 2000, she urged the court to hold that Mr CC Chun must be deemed to have accepted the accuracy of the letters.

The Respondents' Case

In response, Cik Sharifah Intan bte Syed Adam, the learned counsel for the respondents/plaintiffs, submitted as follows:

First, there was in fact no dispute since the amount of RM360,423.86 had already been admitted to by the defendants in their letter dated 1 December 1999. She relied on the High Court case of *Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 in support of her argument that where a claim is admitted it does not call for settlement by arbitration. She drew the attention of the court to the failure of the defendants to traverse this assertion of the plaintiffs and that in so doing, the defendants should be taken to have admitted the plaintiffs' assertion that the defendants have admitted liability for the said sum. She relied on the oft-cited case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 in which the Court of Appeal held that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted. She also relied on the High Court case of *Massabudi Corp Sdn Bhd v. Bactra Properties Sdn Bhd* [1997] 5 CLJ 382 in support of her argument that cl. 22 of the contract which provides for disputes to be referred to arbitration does not apply because the plaintiffs' claim against the defendants is for a debt due and owing from the defendants to the plaintiffs.

Secondly, the defendants by entering an unconditional appearance and filing an affidavit-in-reply to the plaintiffs' application for summary judgment had taken two steps in the proceedings. She relied on the decisions of the Court of Appeal in the cases of *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd & Anor Appeal* [1999] 2 CLJ 843 and *Trans Resources Corporation Sdn Bhd v. Sanwell Corporation & Anor* [2001] 1 CLJ 449 and also the decision of the High Court in the case of *Usahabina v. Anuar Yahya* [1998] 2 CLJ Supp 131. In the *Usahabina* case Augustine Paul JC (now a judge) held that the filing of a conditional appearance does not amount to a submission to the jurisdiction of the court. His Lordship also held that the effect of filing an unconditional appearance is that it constitutes a waiver of any irregularity there may be and a submission to the jurisdiction of the court.

In respect of the filing by the defendants of their affidavit-in-reply (encl. 8) Mr CC Chun informed the court that based on his recollection of the telephone conversation, Miss Lee Noushi had requested for an extension of time to file an affidavit-in-reply to resist the plaintiffs' application for summary judgment. He had told her to go ahead and file the application and that he may or may

not object to it later on. From his understanding of the law the defendants could still file the application to stay proceedings despite filing an affidavit to resist the plaintiffs' summary judgment application.

Thirdly, the defendants did not state in their supporting affidavit that they were ready to go to arbitration.

Issues For Determination

In my view, having heard the oral submissions of both parties, the issues for my determination in this appeal are as follows:

(1) whether there is a dispute or difference of opinion which must be referred to arbitration;

(2) if the answer to (1) above is in the affirmative, whether the entry of an unconditional appearance by the defendants constitutes a step in the proceedings;

(3) if the answer to (2) above is in the affirmative, whether the plaintiffs are precluded from invoking it because of their failure to give prior notice of the preliminary objection before the learned SAR heard encl. 7;

(4) if the answer to (2) above is in the affirmative, whether the plaintiffs, by filing their affidavit-in-reply (encl. 11), had waived the irregularity;

(5) whether the filing of an affidavit-in-reply to resist a summary judgment application at the same time as the filing of an application to stay all proceedings constitutes a step in the proceedings;

(6) if the answer to (5) above is in the affirmative, whether the plaintiffs are precluded from invoking it because of the prior express agreement between the two firms of solicitors that the plaintiffs' solicitors would not raise the issue at the hearing of the defendants' application for stay; and

(7) if the answer to (1) above is in the affirmative and the answer to (2) above is in the negative, whether the defendants have shown any readiness or willingness to go to arbitration.

First Issue: Whether There Is A Dispute Or Difference Of Opinion

Arbitration agreements generally make it a precondition of the right to arbitrate that there be a dispute or difference between the parties about a matter covered by the arbitration agreement. Arbitration agreements do not oust the jurisdiction of the ordinary courts. However, the defendant to an action who is a party to an arbitration agreement can compel the plaintiff to abide by his bargain to arbitrate by seeking and obtaining a stay of the action from the ordinary courts

in the exercise of their discretion. (See *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497; *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal* [1999] 2 CLJ 843.)

In order to determine the first issue it is important to reproduce below cl. 22 of the contract which contains the arbitration agreement between the parties:

> 22. Timbangtara
>
> Sebarang pertelingkahan dan perbezaan pendapat berhubung dengan kontrak ini akan dirujukkan kepada Penimbangtara (Arbitrator) iaitu seorang yang dipersetujui bersama oleh Samarez Holdings Berhad dan Pembekal selaras dan mengikut kehendak-kehendak Arbitration Ordinance 1950 atau mana-mana undang berkaitan yang berkuatkuasa ketika itu.

This is because whether a particular dispute falls within the scope of an arbitration agreement is a question of construction of the form of words of the arbitration clause, giving the words their natural and proper meaning in all the circumstances of the case. The court is not bound by the doctrine of precedent to construe a particular form of words in an arbitration clause in one contract in the same way as that form of words has been construed in an earlier case involving another contract. Nevertheless, a decision as to the meaning of a particular form of words may be of persuasive authority in a later case involving the construction of the same form of words. The extent to which an earlier decision may be persuasive will depend upon the similarity between the contracts and the surrounding circumstances in the two cases. (See *Halsbury's Laws of England*, vol. 2, 4th edn, Reissue, para 613; *Ashville Investments Ltd v. Elmer Contractors Ltd* [1989] QB 488 at 495, [1988] 2 All ER 577 at 582, CA, per May LJ; *Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 66 per Evans J)

I shall now revert to cl. 22 of the contract. In the Malay dictionary, Kamus Lengkap by Drs. Awang Sudjat Hairul and Yusoff Khan the word "pertelingkahan" has been given, *inter alia*, the meaning "dispute"; the word "sebarang" has been given the meaning "any"; the word "dan" has been given the meaning "and"; the word "perbezaan" has been given, *inter alia*, the meaning "difference"; the word "pendapat" has been given, *inter alia*, the meaning "opinion"; the word "berhubung" has been given, *inter alia*, the meaning "connected"; the word "dengan" has been given the meaning "with"; the word "kontrak" has been given, *inter alia*, the meaning "contract" and the word "ini" has been given the meaning "this".

Translated into English, the words "sebarang pertelingkahan dan perbezaan pendapat berhubung dengan kontrak ini" would mean "any dispute and

difference of opinion connected with this contract". In other words, the court is called upon to decide whether there is a dispute or difference of opinion between the plaintiffs and the defendants in connection with the contract.

An arbitration agreement which provides for the reference of disputes "in connection with" the contract has been held to cover disputes as to misrepresentation, negligent mis-statement and mistake giving rise to a claim for rectification. (See *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] QB 488 at 495, [1988] 2 All ER 577 at 582, CA, per May LJ.)

A dispute or difference arises where there is disagreement about central issues: no claim need be formulated, and the cause of action need not be fully constituted. (See *JF Robertson & Co v. A T James & Co* [1923] 16 L1 L Rep 34 at 36.)

A dispute is a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other. (See *Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor* AIR 1979 SC 1203; *Accounting Publications Sdn Bhd v. Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497.

A failure to agree may not be a dispute, yet it is a difference of opinion. (See *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231; *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497.)

The mere making of a claim does not necessarily constitute a dispute or difference. (See *Union of India v EB Aaby's Rederi A/S* [1975] AC 797 at 807.)

If one party is able to demonstrate that the other party has no defence then there is no dispute or difference. The question whether a party demonstrating has no defence usually arises upon the other party's application for summary judgment which is met by a cross-application for a stay. (See *First Steamship Co Ltd v. C T S Commodity Transport Shipping Schiffahrtsgesellschaftmb H, The Ever Splendour* [1988] 1 Lloyd's Rep 245.)

If the party's claim has been expressly or impliedly admitted there is no dispute or difference. (See *London and North Western and Great Western Joint Rly Cos v. JH Billington Ltd* [1899] AC 79; *Bede Steamship Shipping Co Ltd v. Bunge Y Born Limitada SA* [1927] 27 Lloyd's Rep. 410; *Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177.)

In the instant appeal, having considered the defendants' application for stay (encl. 7) in the light of the defendants' supporting affidavit (encl. 9) and the plaintiffs' affidavit-in-reply (encl. 11) the court is satisfied that there is no

dispute or difference of opinion between the plaintiffs and defendants in connection with the contract because there is an express admission of liability by the defendants of an outstanding debt, ie, the sum of RM360,423.86 being the principal amount of fertilisers supplied to the defendants by the plaintiffs. This is because the defendants have clearly and unequivocally admitted in their letter dated 1 December 1999 that they are indebted to the plaintiffs for this amount. The letter states as follows:

"SAMAREZ HOLDINGS
SAMAREZ HOLDINGS BERHAD
Level 9, Menara Bank Pembangunan
Jalan Sultan Ismail, P.O. Box 12992
50796 Kuala Lumpur, Malaysia

Tel: 03-292 2878
Fax 03-292 6531

December 1, 1999

Niaga Tani Sdn. Bhd
No. 12, Peresiaran Kilang
Jelapang Light Industrial Estate
30100 Ipoh
Perak Darul Riezuan.

Dear Sir,

COMMITMENT LETTER FOR FERTILIZER SUPPLIED

The abovementioned and discussion between En. Khaw Beng Siong / En. Izham Ismail is referred.

As discussed, the balance outstanding as at December 1, 1999 stands at RM 360,423.86. As agreed, we undertake to pay RM20,000.00 (Ringgit Malaysia: Twenty Thousand Only) monthly, until we have improved our cashflow position.

We wish to extend our appreciation for your understanding on the above matter and look forward to long and mutually beneficial relationship between our two establishments.

Thank you.

Yours faithfully
SAMAREZ HOLDINGS BERHAD

Sg.

ABD. RAOF ABD. JAMIL
Finance Manager

In addition, the failure of the defendants to contradict the positive assertion by the plaintiffs on a material issue, ie, the liability of the defendants for the fertilisers supplied by the plaintiffs, in para. 5 of the plaintiffs' affidavit-in-reply (encl. 11) in opposition to the defendants' application for stay (encl. 7) is also to be construed as an admission by the defendants. (See *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.) Paragraph 5 reads as follows:

> 5. Saya menafikan perenggan 6 Afidavit Defendan tersebut dan menyatakan bahawa tiada terdapat pertelingkahan yang timbul mengenai kontrak tersebut. Tuntutan yang dibuat oleh Plaintif adalah jelas mengenai baja-baja yang telah dijual dan dihantarserah kepada Defendan dan jumlah yang terhutang pula adalah tidak dipertikaikan oleh Defendan. Juga tiada sebarang pertelingkahan tentang mana-mana klausa kontrak tersebut untuk dirujuk kepada penimbangtara. Malahan, jumlah prinsipal sebanyak RM360,423.86 tersebut adalah diakui sendiri oleh pihak Defendan melalui surat bertarikh 1.12.1999. Dilampirkan di sini sesalinan surat tersebut dan ditandakan sebagai ekshibit 'VCK-1'.

With regard to the plaintiffs' claim for interest on the defendants' overdue accounts the court is satisfied that there is also no dispute nor difference of opinion in connection with the contract although the contract is silent on the issue of whether the plaintiffs are entitled to charge the defendants interest on overdue accounts of principal. The reason is because by their conduct in not objecting, challenging nor questioning the bottom left portion of the monthly invoices which contain a stipulation as to the monthly rate of interest charged on overdue accounts, the three debit notes and the two-paged statement which concern the amount of interest due and owing to the plaintiffs in respect of late payments before the writ of summons was issued and in not filing an affidavit-in-reply to traverse these positive averments of the plaintiffs in paras. 7 and 8 of the plaintiffs' affidavit-in-reply the defendants must be taken to have impliedly admitted liability for the plaintiffs' claim for interest amounting to RM8,616.53. (See *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.)

Paragraphs 7 and 8 read as follows:

> 7. Saya menafikan perenggan 8 Afidavit Defendan tersebut. Segala penyata bulanan, invois dan Debit Note telah diserahkan kepada Defendan. Oleh yang demikian, tidak timbul isu bahawa Defendan tidak mengetahui apakah jumlah sebenar yang terhutang dan bagaimanakah pengiraan faedah-faedah yang dikenakan kepada Defendan. Dilampirkan di sini salinan-salinan dokumen tersebut dan ditandakan sebagai ekshibit 'VCK-2".
>
> 8. Saya juga menafikan perenggan 9 Afidavit Defendan tersebut dan menyatakan bahawa pengiraan faedah tersebut ada terkandung di dalam

> invois-invois dan Debit Note yang telah diserahkan kepada Defendan seperti ekshibit 'VCK-2' di perenggan 7 Afidavit saya di sini. Defendan juga tidak pernah membantah atau menyoal tentang yang sama daripada Plaintif dan adalah kini diestop daripada menafikan yang sama.

In the English case of *London & North Western & Great Western Joint Railway Companies v. JH Billington Ltd* [1899] AC 79 the appellants brought an action in the county court of Chester against the respondents to recover railway charges of Pound Sterling 38 7s. The respondents gave notice to defend and defended the action on the ground that the charges were unreasonable and that the county court had no jurisdiction to decide the matters in dispute since such jurisdiction had been ousted by a statute which provided for any difference arising under the section which provided for the imposition of the railway charges to be determined by an arbitrator to be appointed by the Board of Trade. The House of Lords found that the respondents had not protested that the charges were unreasonable before action was filed. It was only after the action was filed that the respondents said for the first time that the charges were unreasonable. Thus, the House of Lords held that as there had been no difference existing between the parties before the action was brought it was the court which had the jurisdiction to determine the appellants' action and not the arbitrator.

The above case was followed by Rowlatt J in another English case, namely, *London and North Western Railway v Jones* [1915] 2 KB 35 where the learned judge in dealing with an arbitration clause said as follows:

> It is now quite clear from the decisions in *London and North Western Ry. Co. v. Donellan*, and *Midland Ry. Co. v. Loseby* that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the Courts have no jurisdiction to determine that difference. It does not, however, follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry. Cos. v. Billington*, where the company did obtain judgment in the Courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant had accepted the services with full knowledge of what was charged without contesting their reasonableness, he could not be heard to say that there was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that the demand has been agreed to.

George J in the Malaysian case of *Elf Petroleum SE Asia Pte Ltd v. Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 in turn followed the above case when his Lordship in dismissing an application by the defendants to strike out the plaintiffs' writ of summons because of an arbitration clause in a written agreement between the parties which provided that any claim or controversy arising out of the contract shall be settled by arbitration relied on the above passage from the judgment of Rowlatt J.

His Lordship, consequently, held as follows at p. 179, paras C to D:

> In my judgment what we have is a mere refusal to pay upon a claim which had been admitted as being owing to the plaintiffs. There is nothing to be settled by arbitration. … . Where a claim is admitted it does not call for a settlement by arbitration. All that is called for is for payment of the admitted amount which can be by an action in the Courts as has been done in the instant case.

Over the causeway, in the Singapore case of *Uni-Navigation Pte Ltd v. Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876, GP Selvam J having referred to the case of *Nova (Jensey) Knit Ltd v. Kammgarn Spinnerei GmbH* [1977] 1 WLR 713 where the House of Lords held that an arbitration agreement did not extend to an action on bills of exchange which constituted independent contracts and additionally there was no dispute as to the claims on the bills of exchange observed as follows:

> ... where the claim is undisputed or indisputable the courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration.

In the third English case of *Bede Steamship Shipping Co Ltd v. Bunge Y Born Limitada SA* [1927] 27 Lloyd's Rep 410 the arbitration agreement was contained in cl. 39 of a charter party which provided that all disputes arising out of the contract shall be referred to arbitration. The plaintiffs, the ship owners of a steamship Bedefell, had sued the defendants, the charterers, for a certain sum in respect of balance of freight. The defendants resisted the claim. It was contended by Mr Porter, learned counsel for the plaintiffs that since there was no dispute in regard to a sum of 416 pounds there was nothing which ought to have been submitted to arbitration. However, Mr Le Quesne, learned counsel for the defendants contended that cl. 39 would apply wherever one party is claiming money from the other and the other refuses to pay it. In holding that the plaintiffs were entitled to claim the sum of 416 pounds as there was no dispute and that the plaintiffs were, therefore, not obliged to claim arbitration MacKinnon J said as follows at p. 413, right hand column and p. 414, top left hand column:

> Now Mr. Le Quesne disputes that, and he, I think logically, goes so far as to say this, that this clause would apply whenever one party is claiming money from the other and the other refuses to pay it. If, for instance, the plaintiffs had claimed 416 pounds as the amount due to them, and the defendants had said: "We admit that 416 pounds is due and we will pay it," and then kept on promising to pay it but did not pay it, and went on simply abstaining from paying until after June 11, and that if then, their patience being exhausted, the plaintiffs had issued a specially endorsed writ for 416 pounds, Mr. Le Quesne said that this clause would have been a defence, because, whenever there is a claim by one party on the other, and that claim is not paid by the other, there is a dispute which must go to arbitration … .
>
> Well, now, I do not agree with that suggestion for a moment. The clause only provides that disputes shall be referred to arbitration. A mere refusal to pay or failure to pay money which is admittedly due does not, I think, create a dispute which must be referred under that section. It is difficult to suppose that there could be any authority upon this, but it is very similar to the distinction drawn by Rowlatt, J., in a case arising under the provisions of an Act about railway charges which also provided for arbitration. That is the case of the *London & North Western Railway Company v. Jones,* [1915] 2 K.B. 35. There he says that various decisions have decided that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the Courts have no jurisdiction to determine that difference. It does not, however, follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. … It seems to me that we are bound to hold, firstly, that the only case in which the Court can be appealed to before arbitration is where the defendant has agreed the demand and merely refuses to pay; secondly, that wherever this cannot be shown and he has not paid, the case must be treated as one in which a difference has arisen … .
>
> In the same way, I think that where there is a claim, the amount of liability for which is not disputed, I do not think that there is any dispute within the meaning of Clause 39 which must be sent to arbitration.

In *Massabudi Corp Sdn Bhd v. Bactra Properties Sdn Bhd* [1997] 5 CLJ 382, Low Hop Bing J found that the claim of the plaintiffs, the main contractor, against the defendants, the employer, was for the balance outstanding due from the defendants pursuant to the progress payment certificate issued by the architect for work done. Following the decision of the Supreme Court in *Pembinaan Leow Tuck Chin & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345 His Lordship dismissed the defendants' application for a stay of proceedings pending reference to an arbitrator and held that such a claim is to be construed as a debt due and owing. Consequently, he held that the plaintiffs' claim is not a "dispute" or "difference" for reference to an arbitrator under cl. 34 of the agreement.

In my respectful view, the Federal Court case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat (t/a Juta Bena)* [1996] 1 CLJ 231 which has been cited by Miss Lee Noushi is distinguishable because the facts in that case are different. In that case, the Federal Court found that the learned trial judge had erred in refusing the appellant's application for a stay of all proceedings pending a reference to arbitration pursuant to cl. 43 of the written contract between the two parties and s. 6 of the Arbitration Act 1952 because there was abundant evidence before the learned trial judge which disclosed a dispute on each of the three issues raised by the appellant. The three issues are as follows:

(1) whether the appellant was justified in deducting liquidated and ascertained damages under the contract from the sums claimed by the respondent;

(2) whether the abandonment of works by the respondent amounted to a breach of contract; and

(3) whether the variation orders had been properly issued.

The Federal Court also ruled that since there is no requirement in s. 6 of the Arbitration Act 1952 that the dispute or difference should be *bona fide* the exercise of discretion by a judge that there is no *bona fide* dispute is fraught with danger. Further the added condition that a dispute must be *bona fide* in order for a stay to be granted would take the court into an exercise that *ex necessitae rei* involves a critical examination of the merits of the claim. Such an exercise is not contemplated by the Act and is certainly outside the parameters of the court's function under s. 6. (See also *Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497.)

Second Issue: Whether Entry Of Unconditional Appearance Constitutes A Step In The Proceedings

Assuming that I am wrong in deciding the first issue and there is in fact a dispute or difference of opinion which falls within the ambit of the arbitration agreement contained in cl. 22 of the contract, I will have to consider and determine the second issue which is whether the defendants have taken a step in the proceedings within the provisions of s. 6 of the Arbitration Act 1952. This is because when the defendants were served with the writ of summons they had an option whether to defend the proceedings or to compel the plaintiffs to resort to arbitration in view of the arbitration agreement contained in cl. 22 of the contract. If they had opted for the former course of action then they were at liberty to enter an unconditional appearance. If the defendants had done just that, their act of entering an unconditional appearance would be construed to mean that they had invoked the jurisdiction of the court and had voluntarily submitted themselves to the jurisdiction of the court thereby

consenting that the court proceedings shall continue until their final culmination in a judgment or order. However, if the defendants had opted for the latter course of action then they must enter only a conditional appearance in order to make it known to the plaintiffs and the court that the intention of the defendants is to challenge the jurisdiction of the court and to compel the plaintiffs to perform their side of the arbitration agreement which is set out in cl. 22 of the contract.

Having considered the second issue I am satisfied that there is ample authority which dictates that the second issue should be answered in the affirmative. In the case of *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal* [1999] 2 CLJ 843 the Court of Appeal followed the decision of Augustine Paul JC (now a judge) in the *Usahabina* case and held that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s. 6 of the Arbitration Act 1952. Gopal Sri Ram JCA in delivering the judgment of the court had this to say at p. 848:

> The primary question that has arisen acutely for decision in these appeals is whether the entry of an unconditional appearance amounts to a step in the proceedings. Here, as I have earlier observed, the respondent entered an unconditional appearance to the appellant's writ. If that is a step in the proceedings, then, the respondent obviously failed to satisfy an essential pre-requisite postulated by the section.

He continues as follows at pp. 848-849:

> ... it has been held by several decisions at first instance that a defendant, by entering an unconditional appearance, does not take 'a step in the proceedings' within the context of s. 6 of the Act. They were all considered by Augustine Paul JC, in *Usahabina v. Anuar bin Yahya* [1998] 2 CLJ Supp 131. It is a decision upon which the appellant places the utmost reliance.
>
> The judgment in that case also contains a useful discussion of what the courts here and in England have held to constitute a step in the proceedings. After a careful survey of the relevant English case law upon the subject, the learned judicial commissioner (now a judge of the High Court), came to the conclusion that the entry of an unconditional appearance does indeed amount to a step in the proceedings. He did so on the basis that the equipollent United Kingdom statutory provision (s. 4(2) of the Arbitration Act 1950), by its language, expressly excludes the entry of an appearance amounting to a step in the proceedings. That this is indeed the position appears sufficiently from a reading of s. 4(2) of the United Kingdom Arbitration Act 1950 which provides as follows:
>
> > Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any

person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may **at any time after appearance**, and before delivering any pleading or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement of arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (Emphasis added.)

Section 6, however, makes no such qualification. It would appear from the judgment of Augustine Paul JC, that the decisions of Malaysian courts that held the entry of an unconditional appearance not to amount to a step in the proceedings did so by acting upon English cases without properly appreciating that the two provisions (s. 6 of the Act and s. 4(2) of the United Kingdom statute) are differently constructed.

After a careful consideration of the cases upon the subject, I have reached the conclusion that *Usahabina v. Anuar bin Yahya* was rightly decided and that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s. 6 of the Act. I find it unnecessary to formulate my own reasons for arriving at my conclusion. Instead, I gratefully adopt all that was said by Augustine Paul JC upon the point in *Usahabina*. It follows that the line of cases that take the contrary view were wrongly decided and ought no longer to be followed. In my judgment, if a defendant intends to apply to stay an action in reliance of s. 6 of the Act, he must enter a conditional appearance before moving the court.

Since the respondent in the present instance had taken a step in the proceedings, it lost the right to invoke s 6 of the Act.

In my respectful view, the reliance by Miss Lee Noushi on the two High Court cases of *The "Dong Moon" Trans Asia Shipping Co Ltd v. "Dong Moon" Owners & Ors* [1979] 1 MLJ 152 and *Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2)* [1999] 3 CLJ 215 in support of her submissions that the entry of an unconditional appearance did not preclude the court's right to entertain the defendants' application for a stay of proceedings pending reference to arbitration is misplaced because the first case was one of the many High Court cases which was considered in depth and not followed by Augustine Paul JC (now a judge) in the *Usahabina* case at pp. 144 and 145 and his decision and reasoning have been adopted with approval by Gopal Sri Ram JCA in the *Interscope* case.

The second case by her own submissions has since been overruled by the Court of Appeal in *Trans Resources Corporation Sdn Bhd v. Sanwell Corporation*

a & *Anor* [2001] 1 CLJ 449, at p. 454, where Shaik Daud Md Ismail JCA in delivering the judgment of the court said as follows:

> The High Court in the present case did not have benefit of the subsequent judgment of the Court of Appeal in the Interscope when it decided on the same issue. Until overruled by the Federal Court, this court is bound by its own decision in *Interscope*. As stated earlier in the present case, the first respondent entered an unconditional appearance, therefore it lost its right to rely on s. 6 of the Act, to move the court to stay the action. On this score alone, we allowed the appeal with costs here and below to be paid by the first respondent and we set aside the order of the High Court. We also ordered the deposit to be refunded to the appellant.

Third Issue: Whether Failure To Give Prior Notice Of Preliminary Objection Before SAR Precludes Its Invocation In This Appeal

In my view this issue must be answered in the negative because although the appeal to the judge in chambers (encl. 22) is called an appeal, it is in actual fact a rehearing of the plaintiff's application. In this so-called appeal, I will have to deal with the plaintiffs' application afresh and exercise my own independent discretion as if the application is being heard before me for the very first time without being constrained or fettered by the decision of or the exercise of discretion by the learned SAR. (See *Seloga Jaya Sdn Bhd v. Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716.)

Fourth Issue: Whether Filing Of Affidavit-In-Reply By Plaintiffs Constitutes A Waiver

In my view the fourth issue whether the plaintiffs, by filing their affidavit-in-reply (encl. 11), had waived the irregularity constituted by the entry of an unconditional appearance by the defendants must be answered in the negative. The reason is because encl. 11 was clearly filed to resist and oppose the defendants' application for stay.

The case of *Yoong Jih Ping & Anor v. Gunapati Suppiah & Ors* [1995] 3 CLJ 299 which was cited by Miss Lee Noushi is not applicable here because in that case the facts are entirely different. There, the plaintiffs had filed a writ against the defendants praying, *inter alia*, for an injunction to restrain the defendants from representing or holding themselves out as the new office-bearers of the Executive Council of the Johor Consumers Association (JCA), a society registered under the Societies Act 1966 (the Act). The defendants in applying to strike out the plaintiffs' writ of summons and statement of claim under O. 18 r. 19 of the RHC claimed that the court had no jurisdiction to hear the matter on the ground that the matter had to be referred to the Registrar of Societies in accordance with s. 16 of the Act as it amounted to a dispute amongst office bearers of a society registered under the Act and the

court had no power to deal with the matter.

The plaintiffs filed an affidavit-in-reply stating that the dispute had been referred to the Registrar of Societies *vide* two letters but there was no response. The plaintiffs also contended that the defendants could not plead s. 16 of the Act at that stage. Despite having filed their affidavit-in-reply, when the defendant's application to strike out the plaintiffs' writ of summons and statement of claim came up for hearing before the learned judge, the plaintiffs raised a preliminary objection. The plaintiffs relied on the failure of the defendants to raise the issue of jurisdiction in, *inter alia*, the several statements of defence filed by the defendants. Mohd Ghazali bin Mohd Yusoff JC (now a judge) followed the decision in *Jasabena Sdn Bhd v. Beh Heng Poo & Anor* [1985] 1 MLJ 394 and overruled the plaintiffs' preliminary objection and ordered the hearing of the application to proceed on its merits on the ground that by filing affidavits in opposition and failing to give prior notice of an intention to raise a preliminary objection, the party which raised it has waived their rights to take the preliminary objection.

In the instant appeal encl. 11 was filed in opposition to encl. 7. It was not filed in opposition to encl. 5 which was the defendants' entry of unconditional appearance. Therefore, it cannot be said that there is a waiver by the plaintiffs of their right to rely on the filing of an unconditional appearance by the defendants as constituting a step in the proceedings.

Fifth Issue: Whether Filing Of An Affidavit-In-Reply To Resist A Summary Judgment Application At The Same Time As Filing An Application To Stay All Proceedings Constitutes A Step In The Proceeding

In my view, this issue must be answered in the negative because the affidavit-in-reply was filed by the defendants simultaneously with their application for a stay of all proceedings.

In the English case of *Pitchers Ltd v. Plaza (Queensbury) Ltd* [1940] CA 151, the plaintiffs sued the defendants by a specially indorsed writ for a sum of money which they alleged to be due to them under a building contract. The contract included an arbitration clause, to be operative on either party forthwith giving to the other notice of any dispute or difference. The plaintiff took out a summons under O. 14 of the RSC for leave to sign final judgment. The defendants filed an affidavit and appeared before the master claiming that they had a defence to the action. On the master's giving leave to sign judgment the defendants appealed against his order, and only then applied for a stay of the action by reason of the arbitration clause included therein.

The Court of Appeal held that the defendants were precluded from relying on the arbitration clause as they had taken a step in the action when they

opposed the summons for leave to sign judgment before the master. Nevertheless, in passing, Lord Goddard LJ observed that no step is taken in the action by a defendant opposing a summons under O. 14 of the RSC who not only raises the matter of the arbitration clause in his affidavit, but also at the same time takes out a summons to stay the action.

The facts in the instant appeal are to be contrasted with those in another English case of *Turner & Goudy v. McConnel & Anor* [1985] 1 WLR 898 where the plaintiffs having issued a writ against the defendants claiming the balance due under a building contract also applied for summary judgment under O. 14 of the RSC. The defendants, who had acknowledged service of the writ and stated their intention to defend the action, filed an affidavit stating their reasons for contesting the plaintiffs' claim. The affidavit also referred to an arbitration clause in the contract and invited the court to consider whether arbitration would be a more appropriate course. On the first return date of the O. 14 summons the defendants' solicitors appeared before the master who, having read the defendants' affidavit, adjourned the matter to another date because it was a contested matter. Some weeks later the defendants applied to stay the proceedings for arbitration pursuant to s. 4 of the Arbitration Act 1950. The Court of Appeal held that the defendants had taken a step in the proceedings by filing an affidavit showing cause why summary judgment should not have been entered against them and that it was too late for the defendants to apply for a stay for arbitration.

Dhillon LJ in delivering the judgment of the Court of Appeal said as follows at p. 902, paras A to F:

> It is also clearly established by authority binding on this court that if the defendant opposes an application for summary judgment and fails in his opposition, it is then too late for him to apply for a stay. That was decided in *Pitchers Ltd. v. Plaza (Queensbury) Ltd.* [1940] 1 All E.R. 151. In his judgment Slesser L.J. said, at p. 154:
>
> > I entertain myself no doubt whatever that they took a step in the action when they appeared before the master and asked for leave (to quote their affidavit) to defend the action … . In truth summons to sign final judgment was answered by affidavit, and no application was made to stay the action on the ground of the arbitration clause.
>
> There was discussion in that case about the possibility that a defendant might file an affidavit in opposition to the order 14 application and, at the same time, issue a summons for a stay, which is of course now common practice, and Goddard LJ said, at p. 156:
>
> > For myself, I am not at all satisfied that, if the defendant filed an affidavit in answer to an application for judgment under R.S.C., Ord. 14, although he may raise the arbitration clause, it may not be said that

> he has taken a step in the action unless at the same time he has taken out a summons to stay the action. Of course, if he has taken out a summons to stay the action which comes on (as, in the ordinary course, it would) at the same time as the summons for judgment, and the master refuses the application to stay, and says, 'On the plaintiffs' summons, I give judgment,' I should say that there could be no doubt that, in appealing against both the refusal of the master to stay and the order giving leave to sign judgment, the defendant is not taking a step in the action. He has done what he can, by taking out the summons to stay, to get the action referred. If the master has refused that, and the defendant goes to the judge on that, he must at the same time, of course, also go to the judge and say: 'Set aside the judgment, because, if this had gone to arbitration, it would follow that the master would not have given judgment'.

Sixth Issue: Whether Prior Express Agreement Between The Solicitors Of Both Parties Precludes The Plaintiffs' Counsel From Invoking The Filing Of An Affidavit-In-Reply By The Defendants To Resist A Summary Judgment Application As Constituting A Step In The Proceedings

Based on what has been said by both Miss Lee Noushi and Mr CC Chun and the contents of the two letters which were shown to the court by the former I am satisfied that Mr CC Chun had agreed that the filing of encl. 8 by the defendants would not prejudice the defendants' application for a stay of all proceedings and to refer the matter to arbitration. Therefore, the plaintiffs should not be allowed to rely on the filing of the affidavit-in-reply (encl. 8) by the defendants to resist the plaintiffs' application for summary judgment (encl. 6) as a step in the proceedings.

The two letters are reproduced below:

GIDEON TAN RAZALI ZAINI
PEGUAMBELA & PEGUAMCARA - ADVOCATES & SOLICITORS

8 November, 2000

MESSRS C.C. CHUN & CO BY COURIER
Advocates & Solicitors
No. 39-A, 1st Floor
Jalan Seenivasagam
30450 Ipoh
Perak Darul Ridzuan

Dear Sir,

IPOH HIGH COURT SUIT NO. 22-88-2000
NIAGA TANI SDN BHD -VS- SAMAREZ HOLDINGS BERHAD

Please find enclosed a copy of:

(i) the Affidavit in Support of Defendant affirmed by Ab. Raof bin Abd Jamil on the 9 November 2000;

(ii) the First Affidavit in Reply of the Defendant affirmed by Ab. Raof bin Abd Jamil on the 9 November 2000; and

(iii) the unsealed Sumons In Chambers,

by way service of you as the Plaintiff's solicitors.

Kindly be informed that the First Affidavit in Reply of the Defendant filed and served herein is filed and served without prejudice to our client's application vide the abovesaid Summons In Chambers.

Kindly acknowledge receipt.

Yours sincerely

Sg.
LEE NOUSHI
For and on behalf of
GIDEON TAN RAZALI ZAINI
Encl.
c.c. client

C.C. CHUN & CO
We hereby acknowledge receipt of the above

Sg.
...
Date: 10.11.2000
@ 11.00 a.m.

GIDEON TAN RAZALI ZAINI
PEGUAMBELA & PEGUAMCARA - ADVOCATES & SOLICITORS

9 November, 2000

MESSRS C.C. CHUN & CO
Advocates & Solicitors
No. 39-A, 1st Floor
Jalan Seenivasagam
30450 Ipoh
Perak Darul Ridzuan

BY COURIER

Dear Sir,

IPOH HIGH COURT SUIT NO. 22-88-2000
NIAGA TANI SDN BHD -VS- SAMAREZ HOLDINGS BERHAD

We refer to the telephone conversation between Mr. C.C. Chun and Ms Lee Noushi today.

We write to confirm that you have agreed that the act of filing the First Affidavit in Reply of the Defendant affirmed by Ab. Raof bin Abd Jamil on

> 8 November 2000 will not prejudice our clients' application for Stay of Proceeding and referring the matter to the Arbitrtor.
>
> Yours sincerely
>
> Sg
>
> LEE NOUSHI
> For and on behalf of
> GIDEON TAN RAZALI ZAINI

The following statement of the law extracted from para. 627, at p. 347 of *Halsbury's Laws of England*, 4th edn, Reissue, vol. 2, is applicable:

> An applicant may take what would otherwise be a step if he makes it clear that that act is done without prejudice to his right to apply for a stay.

In *Metropolitan Tunnel and Public Works Ltd v. London Electric Rly Co* [1926] Ch 371, there was an engineering contract which contained an arbitration agreement to refer questions of construction of the contract to arbitration. The plaintiffs took out an originating summons for the determination of a question concerning the true construction of the contract, ie, whether for the purpose of monthly payments to be made to the plaintiffs thereunder, the value of the work executed was to be ascertained by adding to the prices contained in the schedules a proportionate amount of the sum therein provided for "general contingencies" whereupon the defendants wrote a letter to the plaintiffs stating that the matter could not be determined by the courts and indicating that if they entered an appearance, it would be without prejudice to their taking exception to the procedure adopted by the plaintiffs. The defendants subsequently moved for a stay of proceedings pursuant to s. 4 of the Arbitration Act 1889.

Lord Hanworth MR in delivering the judgment of the Court of Appeal said as follows:

> If a party does take what is treated as a step in the proceedings, he, by an act of volition on his part, abandons his right to apply to stay the proceedings under s. 4. We have been referred to a number of cases upon what constitutes a step, but it appears to me that in none of them was there such an overriding and definite statement of the position as there was in the present case, where the solicitors had already written to say that their undertaking to appear would only stand good if it was to be taken without prejudice to their rights which should arise. In my opinion, therefore, there is no ground in the present case for saying that there was a step which disentitled the defendants to apply for a stay of the proceedings.

Seventh Issue: Whether The Defendants Have Shown Any Readiness Or Willingness To Go To Arbitration

In my view, even assuming that I am satisfied that there is a dispute or difference of opinion connected with the contract which must be referred to arbitration and the defendants have entered a conditional appearance as opposed to an unconditional appearance, the seventh and final issue should be answered in the negative because there is a clear failure by the defendants to show in their affidavit (encl. 9) in support of their application for stay (encl. 7) that they were at all times ready and willing to do all things necessary to the proper conduct of the arbitration. (See *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497.)

In the premises, I dismissed the defendant's appeal to the judge in chambers (encl. 22) with costs.